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No. 82-86

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
RESPONDENTS

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In support of their argument that this Court ought not review the October 1982 decision of the United States Court of Appeals for the Fifth Circuit, *American Trucking Associations, Inc.* v. *ICC*, 659 F. 2d 452 (5th Cir. 1981), respondents assert that the meaning of the October mandate was always clear to the parties (or at least to respondents) and that the court of appeals' February 1982 mandamus order, *American Trucking Associations, Inc.* v. *ICC*, 669 F. 2d 957 (5th Cir. 1982), was issued for the sole purpose of assuring compliance with the October mandate and not to resolve ambiguities inherent in that October mandate. This is a serious misstatement.

1. As discussed in the Commission's petition for certiorari, pp. 14-22, after the court of appeals issued its October decision and mandate, *all* of the parties were at odds over the meaning of the court's action. Contrary to respondents' assertions, they were, in fact, *not* always

fully cognizant of and confident in the meaning of the October decision and mandate. Indeed, their pleadings to the Fifth Circuit *after* the October decision seekin issuance of a writ of mandamus pointedly demonstrate their misapprehension of the October mandate. At least three obvious examples of such misapprehensions are contained in respondents' proposed mandamus order (Appendix A hereto) prepared by them for the Fifth Circuit.[1] (Appendix F to respondents' mandamus request to the Fifth Circuit). Respondents mistakenly believed at that time that the October decision and mandate required the Commission:

> (a) in addition to household goods and commodities in bulk, to except all "of the other groups or classes of commodities traditionally excepted from certificates and permits granting general commodities authority (i.e., classes A and B explosives, size and weight commodities, commodities requiring temperature-controlled equipment, and any other similar area requiring specialized equipment or service) . . ." (*Ibid.*, p. 2) (Also see respondents' reply brief, p. 3, in the mandamus case, Appendix B hereto);
>
> (b) to entirely "[d]iscontinue the use of STCC codes, or equally broad descriptions . . ." (*Id.*), and;
>
> (c) "Except bulk and other specialized forms of service from broadscale grants of specific commodity authority . . ."

[1]Respondents also believed, *inter alia*, that the October decision mandated that applicant carriers must demonstrate, as a prerequisite to a grant of operating authority, that they already possessed the necessary equipment. (Page 29 of respondents' reply brief, filed February 5, 1982, in the mandamus case. (Appendix C hereto). The February mandamus decision at 669 F. 2d 963, n. 7, clarifies that no actual showing of current ownership of the requisite equipment is necessary.

In its February 1982 mandamus decision and order the Fifth Circuit dispelled, *inter alia*, all three of these beliefs held by respondents as to the meaning of the October decision. The February decision clarified that the only two special service exceptions are household goods and commodities in bulk. (669 F. 2d at 962-963 ¶s 4.-5.; and 963 ¶s 3.-4.) And, those two specialized services are to be excluded *only* from grants of general commodities authority, not from grants of specific commodities authority. (*Id.*) Additionally, the Fifth Circuit clarified that the STCC code and other equally broad categories may be used, but applicant carriers must be permitted to seek other categories if they can show they would be unfit, unwilling, or unable to handle the broader categories. (*Ibid.*, 962 ¶2; and 963 ¶2).

2. The plain language of the February mandamus decision expressly states, in no uncertain terms, that it is being issued "*to clarify the mandate* and to direct future compliance with it . . . ." (669 F. 2d at 961). Indeed, for two pages (669 F. 2d at 960-961) of its five-page decision the Fifth Circuit discusses and defends its right to clarify its October decision and mandate.

Clearly, the court of appeals' February mandamus decision was intended to and did resolve genuine ambiguities in its October decision. Thus, the *entire* case and controversy, including the October decision and mandate, is properly before this Court.

Respectfully submitted,

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September 1982

CERTIFICATE OF SERVICE

I hereby certify that on this the 10th day of September 1982, I have served true and accurate copies of the foregoing Reply to Respondents' Brief In Opposition To Petition For Certiorari, upon counsel for all parties, by first-class mail, postage prepaid, in the following manner:

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APPENDIX A

[Respondents' proposed mandamus order.]

PROPOSED ORDER

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-4026

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, RESPONDENTS

PETITION TO COMPEL ENFORCEMENT OF THIS COURT'S MANDATE

Before RUBIN, RANDALL and TATE, Circuit Judges:

Consistent with the foregoing opinion, which supplements our opinion of October 1, 1981, the Interstate Commerce Commission is hereby ordered to comply with the previous decision, which overturned the "policy statement" in Ex Parte No. 55 (Sub-No. 43A) and the "guidelines" adopted as part of Ex Parte No. MC-142 (Sub-No. 1) on the grounds both proceedings promulgated rules which were beyond the scope of the Commission's authority. The Commission has mistakenly limited

its response to our earlier opinion in an attempt—unsuccessful as it must be—to correct a few specifically identified failings, which were merely used as illustrations to highlight the basic rationale we articulated.

Therefore, the Interstate Commerce Commission is hereby directed to take the following actions in order to comply with the Interstate Commerce Act and this Court's opinion and mandate:

1. Rescind by notice in the *Federal Register* the "policy statement" in Ex Parte 55 (Sub-No. 43A) and the "guidelines" promulgated in Ex Parte No. MC-142 (Sub-No. 1);

2. Require applicants for general commodities authority who also seek authority to transport bulk commodities, household goods, or any of the other groups or classes of commodities traditionally excepted from certificates or permits granting general commodities authority (i.e., classes A and B explosives, size and weight commodities, commodities requiring temperature-controlled equipment, and any other similar area requiring specialized equipment or service) to establish by independant evidence: (a) a public need for each of those specialized services and (b) that they are fit, willing, and able to provide the service through the submission of equipment lists, financial statements, or other substantial evidence of record demonstrating the requisite capability and expertise;

3. Discontinue the use of STCC codes, or equally broad descriptions, in framing authority in "fixed molds" and instead grant authority to transport only the classes or groups of commodities for which representative evidence of public need is shown and for which the carrier has demonstrated it is fit, willing and able to perform the service;

4. Except bulk and other specialized forms of service from broadscale grants of specific commodity authority,

absent a showing that applicants are fit, willing and able to provide such specialized service;

5. Require applicants for 50-state authority to establish a public need for the service and their fitness, willingness, and ability to serve points in Alaska and Hawaii through the submission of equipment lists, terminal and other facilities locations, financial statements, and other substantial evidence of record;

6. Require applicants for nationwide authority or for any number of states to provide representative evidence of public need for the service in each state, consistent with this Court's decision in *Miller Transporters, Inc.* v. *United States,* 594 F. 2d 463 (5th Cir. 1979);

7. Vacate by notice in the *Federal Register* decisions and actions of the Commission since October 1, 1981, which grant or issue certificates or permits in violation of the mandate or the foregoing requirements;

8. Submit to this Court and to petitioners within 10 days any interim rules which it proposes to substitute for the invalidated rules, for our approval after we receive petitioners' response; and

10. Publish promptly any interim rules so approved in the *Federal Register.*

It is so ordered.

_____

Circuit Judge

APPENDIX B

[Page 3 of Respondents' Reply]
[Brief in the mandamus case.]

against the statutory requirement that the carrier demonstrate it is "fit, willing, and able" to perform "the transportation authorized" by the certificate or permit; and (3) representative evidence on the record is required to support every ICC determination of the scope of operations to be authorized consistent with the statutory requirement of public need.

In order to illustrate its crucial holding as to the resaonable scope of certificates and permits intended by Congress pursuant to the new law, this Court discussed in detail and rejected certain specific commodity and territorial descriptions mandated by the ICC below, while approving others. Specifically, the Court held that an applicant requesting general commodities authority would not automatically be fit, willing or able to transport bulk commodities or household goods.[3] In defining the parameters for the reasonable use of the Standard Transportation Commodity Code (STCC) or other broad classifications, the Court held that, even through it may be reasonable to use STCC as a "starting point,"

> [the ICC] may not, however, require all applicants regardless of circumstances to fit Procrustean descriptions, and it may not assume that an applicant fit, willing, and able to carry one commodity in an STCC classification, is fit,

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[3]The illustrative nature of the Court's approach should not be open to question. The "fit, willing, and able" statutory language and the Court's general rationale based upon it apply to many other situations. Indeed, in its opening brief, ATA and other petitioners uniformly spoke in terms of all "specialized commodities," such as "size and weight" commodities or those requiring temperature-controlled equipment, *not* simply household goods and bulk commodities. *See, e.g.*, ATA Initial Br., pp. 26-28.

APPENDIX C

[Page 29 of Respondents' Reply]
[Brief in the mandamus case.]

which might be acceptable to the Commission. Clearly, the Commission's absolute persistence in this type of conduct demands immediate action by this Court.

In disputing the justification for our relief, the Department of Justice claims (DOJ Response, p. 7) that the Commission's rules concerning inclusion of commodities in broad grants of authority were not challenged other than as to automatic inclusion of household goods and bulk commodities. *See also* ICC Memo., p. 6. It disregards the fact that ATA and other petitioners have consistently focused on all "specialized commodities," such as commodities, which of their size or weight require special handling or equipment, or those requiring temperature-controlled equipment, not merely household goods and bulk commodities. Petition, p. 3, n. 3. Clearly where a carrier is to be authorized to hold itself out to provide a specialized service, this Court has held that it must demonstrate that it has the requisite equipment and that it is otherwise willing and able to provide such service. Indeed, a recent licensing decision has focused upon "current ownership of the type of equipment necessary for this type of transportation" in considering the general fitness of a carrier. *Baggett Transp. Co.* v. *United States,* No. 81-7748, (11th Cir. decision dated January 25, 1982.). This Court should not hesitate to clarify the scope of its opinion and mandate as requested in our relief. *See City of Cleveland,* 561 F. 2d at 346.